



## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act, and Notice Of Availability and Request for Comments on Draft Restoration Plan / Environmental Assessment

On November 8, 2019, the Department of Justice filed a Complaint and lodged a proposed Consent Decree with the United States District Court for the Eastern District of Michigan in a lawsuit entitled *United States of America, State of Michigan, and the Saginaw Chippewa Indian Tribe of Michigan v. The Dow Chemical Company*, Civil Action No. 1:19-cv-13292. On the same date, the United States Fish and Wildlife Service published a Draft Restoration Plan / Environmental Assessment (“RP/EA”) that relates to various natural resource restoration activities that would be undertaken pursuant to the Consent Decree.

The proposed Consent Decree would resolve natural resource damage claims asserted against The Dow Chemical Company (“Dow”) for injuries to natural resources resulting from releases of hazardous substances, including dibenzo-*p*-dioxins and dibenzofurans, into the environment from a facility that Dow owns and operates in Midland, Michigan. The filed Complaint in this action alleges that injured natural resources include, but are not limited to, fish, mammals, and birds within an Assessment Area that includes portions of the Tittabawassee River and adjacent riverbank and floodplain areas, the Saginaw River and adjacent riverbank and floodplain areas, portions of Saginaw Bay, and an area within Midland affected by aerial deposition of hazardous substances from Dow’s Midland facility. The Complaint also alleges that hazardous substances released from Dow’s Midland facility resulted in the loss of recreational fishing and tribal use services provided by natural resources.

The Complaint asserts claims on behalf of designated federal, state, and tribal natural resource trustees to recover natural resource damages under Section 107 of the Comprehensive

Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607. The Complaint also asserts claims on behalf of state natural resource trustees to recover natural resource damages under Sections 3115(2) and 20126a of the Michigan Natural Resources and Environmental Protection Act, MCL 324.3115(2) and 324.20126a. The natural resource trustees here include the U.S. Department of the Interior, acting through the U.S. Fish and Wildlife Service and the Bureau of Indian Affairs; the Saginaw Chippewa Indian Tribe of Michigan; and the State of Michigan, represented by the Michigan Department of Environment, Great Lakes, and Energy (formerly known as the Michigan Department of Environmental Quality), the Michigan Department of Natural Resources, and the Michigan Attorney General (collectively, the “Trustees”).

Under the proposed Consent Decree, Dow would: (1) implement eight natural resource restoration projects in accordance with requirements set forth in Statements of Work attached to the Consent Decree and subject to oversight and approval of the Trustees; (2) pay \$6.75 million to a restoration account that will be used by the Trustees to fund five additional natural resource restoration projects described in the Consent Decree; (3) pay an additional \$15 million to a restoration account—of which at least \$5 million will be used to fund additional natural resource restoration projects that will be selected by the Trustees in the future, with public input; (4) reimburse the Trustees for past assessment costs not already reimbursed under a memorandum of agreement; and (5) implement two other projects as part of the resolution of a separate State claim for reimbursement of certain State response costs. In addition, under the proposed Consent Decree, the United States, on behalf of Settling Federal Agencies, would pay \$21 million to Dow in exchange for a comprehensive resolution of potential liability of Settling

Federal Agencies for both natural resource damages and for past and future response costs relating to releases or discharges from Dow's Midland, Michigan facility.

Subject to specific reservations of rights set forth in the proposed Consent Decree, the proposed settlement would resolve (1) Dow's potential liability for natural resource damages resulting from releases of hazardous substances or discharges of oil from Dow's Midland facility, (2) Dow's potential liability for reimbursement of a limited set of State response costs identified in the proposed Consent Decree, and (3) specified claims of Dow against the other Settling Parties, including claims against Settling Federal Agencies that Dow contends are also liable for releases or discharges of hazardous substances or discharges of oil from the Midland facility. The proposed Consent Decree does not resolve potential liability of Dow to perform response actions to clean up hazardous substances or discharges of oil released from the Midland facility or to reimburse any response costs incurred by the Settling Parties in connection with releases from the Midland facility.

Consistent with the Department of the Interior's Natural Resource Damage Assessment and Restoration regulations, 43 C.F.R. Part 11, and the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4347, and its implementing regulations at 40 CFR Parts 1500-1508, the Trustees evaluated a suite of three alternatives for conducting the type, quality, and quantity of restoration sufficient to compensate the public for natural resource injuries and service losses resulting from releases of hazardous substances from Dow's Midland facility. Based on selection factors including location, technical feasibility, cost effectiveness, and types and timing of benefits, the Trustees identified a preferred alternative. The Draft RP/EA describes the Trustees' natural resource damage assessment, identifies and evaluates various

alternatives considered by the Trustees to restore, replace or acquire the equivalent of injured natural resources, and identifies the Trustees' preferred alternative.

Under the preferred alternative described in the Draft RP/EA, Dow would implement a set of projects to protect, enhance, and restore habitat for natural resources as well as provide recreational fishing, hunting, park-use, and tribal-use services relevant to the impacted area; provide funding for a set of projects for the Trustees to implement either directly or through partnerships; and provide funding for future projects to be selected by the Trustees with public input, as well as funding to support long-term stewardship of the projects beyond Dow's obligations.

The publication of this notice opens a period for public comment on both the proposed Consent Decree and the Draft RP/EA.

Comments on the proposed Consent Decree should be addressed to the Deputy Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States of America, State of Michigan, and the Saginaw Chippewa Indian Tribe of Michigan v. The Dow Chemical Company*, D.J. Ref. No. 90-11-3-08593. All comments on the Consent Decree must be submitted no later than forty five (45) days after the publication date of this notice. Comments may be submitted either by e-mail or by mail:

| <i>To submit comments:</i> | <i>Send them to:</i>   |
|----------------------------|--|
| By e-mail                  | pubcomment-ees.enrd@usdoj.gov  |
| By mail                    | Deputy Assistant Attorney General<br>U.S. DOJ – ENRD<br>P.O. Box 7611<br>Washington, D.C. 20044-7611 |

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>.

The Justice Department will provide a paper copy of the Consent Decree and/or the Draft RP/EA upon written request and payment of reproduction costs. Please mail your request and payment to:

Consent Decree Library  
U.S. DOJ – ENRD  
P.O. Box 7611  
Washington, D.C. 20044-7611

If requesting a paper copy of both the Consent Decree and the Draft RP/EA, please enclose a check or money order for \$107.50 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy of the Consent Decree without the Draft RP/EA, the cost is \$64.00. For a paper copy of only the Draft RP/EA, the cost is \$43.50.

Comments on the Draft RP/EA should be addressed to Lisa L. Williams, U.S. Fish and Wildlife Service, and reference “TR RP/EA comment” in the subject line. All comments on the Draft RP/EA must be submitted no later than forty-five (45) days after the publication date of this notice. Comments may be submitted either by e-mail or by mail:

| <i>To submit comments:</i> | <i>Send them to:</i>   |
|----------------------------|--|
| By e-mail                  | <a href="mailto:t.river.nrda@fws.gov">t.river.nrda@fws.gov</a>                                     |
| By mail                    | Lisa L. Williams<br>U.S. Fish and Wildlife Service<br>2651 Coolidge Road<br>East Lansing, MI 48823 |

During the public comment period, the Draft RP/EA may be examined and downloaded at this U.S. Fish and Wildlife Service Midwest Region Natural Resource Damage Assessment website:

<https://www.fws.gov/Midwest/es/ec/nrda/TittabawasseeRiverNRDA/>. As described above, a paper copy of the Draft RP/EA may be obtained from the Department of Justice upon written request and payment of reproduction costs.

Randall M. Stone,  
Acting Assistant Section Chief,  
Environmental Enforcement Section,  
Environment and Natural Resources Division.

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